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No. 338

In the Supreme Court of the United States

October Term, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees*

On Appeal from the Supreme Court of the State of Kansas

STATEMENT AS TO JURISDICTION

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INDEX.

PAGE

Opinions Below 2

Basis of Jurisdiction 2

Statute Involved 3

Nature of the Case 3

The Constitutional Questions 7

The Questions Are Substantial 8

Appendix A—Opinion of the Supreme Court of Kansas 13

Appendix B—Memorandum Opinion of the District Court of Wyandotte County, Kansas 23

Appendix C—Findings of Fact and Conclusions of Law entered by the District Court of Wyandotte County, Kansas 27

Appendix D—Kansas Motion Picture Censorship Statutes 32

Table of Cases

American Civil Liberties Union v. City of Chicago, 121 N.E. 2d 585 (1954) 9, 12

Board of Education v. Barnette, 319 U.S. 624 (1943) 12

Burstyn, Joseph, Inc. v. Wilson, 343 U.S. 495 (1952) 2, 8, 9

Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954) 3, 8, 9

Gelling v. Texas, 343 U.S. 960 (1952) 2, 8, 9

Largent v. Texas, 318 U.S. 148 (1943) 8

Lovell v. Griffin, 303 U.S. 444 (1938) 8

Near v. Minnesota, 283 U.S. 697 (1931) 8

PAGE

RKO Radio Pictures, Inc. v. Department of Education, 122 N.E. 2d 585 (1954) 9

Superior Films, Inc. v. Department of Education, 346 U.S. 587 (1954) 2, 10

Thomas v. Collins, 323 U.S. 516 (1945) 8

Statutes

Constitution of the United States

First Amendment 7, 8

Fourteenth Amendment 7, 8

Constitution of Kansas

Article 3, Secs. 1 and 3 2

General Statutes of Kansas, 1949

Kansas Motion Picture Censorship Law

Secs. 51-101 through 51-112 ..... 2, 3

Secs. 74-2201 through 74-2209 ..... 2, 3

Sec. 51.103 ..... 3, 9

Sec. 51-107 4

Sec. 60-3302 2

Sec. 60-3303 2

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HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees*

On Appeal from the Supreme Court of the State of Kansas

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 (2) of the Rules of the Supreme Court of the United States, appellants submit herewith their statement showing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Kansas in this cause.

Opinions Below

The opinion and judgment of the Supreme Court of Kansas is reported in 177 Kan. at page 728 and 282 P. 2d at page 412. It appears at pages 54-60 of the transcript and is reproduced as Appendix A hereto. The memorandum opinion of the District Court of Wyandotte County is not reported and was not a part of the record before the Supreme Court of Kansas but is reproduced as Appendix B hereto. The findings of fact and conclusions of law entered by the District Court of Wyandotte County appear at pages 35-39 of the transcript and are reproduced as Appendix C hereto.

Basis of Jurisdiction

The judgment of the Supreme Court of Kansas reversing the judgment of the District Court of Wyandotte County, Kansas, enjoining the enforcement of the Kansas Motion Picture Censorship Law and declaring said law unconstitutional was entered on April 9, 1955. Notice of Appeal was filed on June 28, 1955.

The Supreme Court of Kansas is the court of last resort in the State of Kansas (Constitution of Kansas, Article 3, Secs. 1 and 3; Secs. 60-3302, 60-3303, G. S. Kan. 1949).

The cause is one in which the validity of the Kansas Motion Picture Censorship Law (Secs. 51-101 through 51-112 and Secs. 74-2201 through 74-2209, G. S. Kan. 1949) was drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity. This Court has jurisdiction on appeal under 28 U. S. C. 1257(2). *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495 (1952); *Gelling* v. *Texas*, 343 U. S. 960 (1952); *Superior Films, Inc.*, v. *De-*

partment of Education and *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954).

Statute Involved

The statute, the validity of which was drawn in question, is the Motion Picture Censorship Law of the State of Kansas (Secs. 51-101 through 51-112 and Secs. 74-2201 through 74-2209, G. S. Kan. 1949), which requires the submission to the Kansas State Board of Review of any motion picture intended for exhibition in the State of Kansas and prohibits the exhibition of pictures disapproved by the Board. The Board is empowered and directed to examine films and disapprove such as "are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (Sec. 51-103, G. S. Kan. 1949). Violation of the statute is declared a misdemeanor punishable by a fine and imprisonment. The full text of the statute is reproduced as Appendix D hereto.

Nature of the Case

Appellant Holmby Productions, Inc., is the producer and appellant United Artists Corporation is the distributor of the motion picture entitled "The Moon Is Blue." Pursuant to the Kansas Motion Picture Censorship Law, appellants submitted a print of their motion picture film to the Kansas State Board of Review. On June 17, 1953, the Chairman of the Board of Review wrote to United Artists Corporation advising it that the Board had disapproved the film and stating that the reason for disapproval was "Sex theme throughout too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme" (Transcript, pp. 12, 18). Thereafter on August 17, 1953, appellants

filed their petition in the District Court of Wyandotte County, Kansas, seeking not only review of the Board's action pursuant to Section 51-107, G. S. Kan. 1949, but also a declaration that the Kansas Motion Picture Censorship Law violates the Constitution of the United States and the Constitution of Kansas, and an injunction against the enforcement of the law by the Kansas State Board of Review, the County Attorney of Wyandotte County and the Attorney General of the State of Kansas (Transcript, pp. 2-8).

Thereafter the Board re-examined the film and on September 11, 1953, the chairman of the Board informed appellants that the film was again disapproved (Transcript, pp. 18, 20). Upon its second examination of the film made after appellants' original petition had called the attention of the Board to the lack of a finding that the film was obnoxious to any standard contained in the Kansas Motion Picture Censorship Law, the Board found in the language of the statute that the film was "obscene, indecent and immoral and such as tend to debase or corrupt morals" (Transcript, p. 20). Despite this difference in language of its statement of the grounds for disapproval of the film, the Board had precisely the same objections to it upon both examinations (Transcript, p. 37).

Defendants filed a motion to strike portions of plaintiffs' original petition and to require other portions to be made more definite and certain (Transcript, pp. 8-9). On November 5, 1953, the motion was granted in part and denied in part (Transcript, pp. 9-10). Plaintiffs filed an amended petition (Transcript, pp. 11-17) again alleging that the Kansas Motion Picture Censorship Law was repugnant to the Constitution of the United States and the Constitution of the State of Kansas. Defendants'

demurrer to the petition was overruled (Transcript, pp. 17-18) and defendants filed answers denying that the Kansas Motion Picture Censorship Law violated either the Constitution of the United States or the Constitution of the State of Kansas (Transcript, pp. 17-21). Plaintiffs thereafter filed a reply specifically alleging that the Kansas Motion Picture Censorship Law as construed and applied by the Board of Review violated both the Constitution of the United States and the Constitution of the State of Kansas (Transcript, pp. 22-24).

The cause came on regularly for trial in the District Court of Wyandotte County before the court without jury. In addition to the foregoing facts which were undisputed and are set forth in substance in the findings of fact made by the court (Transcript, pp. 35-38; *infra*, pp. 27-30, the court viewed the film and heard oral evidence. Thereafter the court entered, *inter alia*, the following conclusions of law (Transcript, p. 38):

> "4. A state statute providing for censorship of motion pictures which has the effect of vesting in a censor an unlimited restraining control over the content of motion pictures is invalid, as repugnant to the First and Fourteenth Amendments to the Constitution of the United States.
>
> "5. The construction by the Board in its decision here under review of the words 'obscene', 'indecent', 'immoral', and 'such as tend to debase or corrupt morals', as used in Section 51-103, General Statutes of Kansas, 1949, by its statement of reasons for disapproval, and by its finding that the content of the motion picture film entitled 'The Moon Is Blue' is obscene, indecent, immoral, and such as tend to debase or corrupt morals, gives to each of these words a meaning so broad and vague as to render it unconstitutional as a basis for censorship, for the reason stated in Conclusion No. 4 above."

Upon the foregoing findings and conclusions the court rendered judgment enjoining appellees from preventing or interfering in any manner with the exhibition of the film.

In accordance with state procedure, appellees appealed to the Supreme Court of Kansas and on April 9, 1955, that court rendered its opinion and entered judgment reversing the trial court (Transcript, pp. 54-60; *infra*, pp. 13-23). The decision of the Supreme Court of Kansas was as follows (Transcript, pp. 54-55; *infra*, p. 13)[1];

> "1. The Kansas State Board of Review is a creature of the statutes; its administrative power in determining approval or disapproval of films is prescribed in G. S. 1949, 74-2201 to 74-2209; and G. S. 1949, 51-101 to 51-112.
>
> 2. Any person aggrieved by an order of the above Board has redress in the district court of Wyandotte county, but on appeal that court and the supreme court can exercise only their judicial authority. They cannot, as superior or supreme administrative bodies, substitute their opinions and conclusions for those of the Board.
>
> 3. The words, 'cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals,' used in the statute (G. S. 1949, 51-103) have an accepted, definite, and clear meaning and furnish no ground for declaring the statute unconstitutional.
>
> 4. This court is not passing upon the merits of the film in question for the reason that the only question presented here is limited to the constitutionality of the statute under consideration."

The entire opinion of the Supreme Court of Kansas plainly demonstrates that the court held (1) that a system

[1]By state statute the Supreme Court of Kansas is required to set forth in a syllabus the points of law determined by the court (Secs. 20-203, 60-3329, G. S. Kan. 1949). Quoted above is the syllabus constituting the decision of the Supreme Court of Kansas in this case.

of prior censorship of motion pictures could validly be enforced by a state; (2) that the standards contained in the Kansas Motion Picture Censorship Law were sufficiently definite to be enforced by an administrative tribunal; and (3) that the courts could not review the judgment of the administrative tribunal in applying those standards except to reverse a decision shown by extraneous evidence to have been fraudulently made. The court expressly refused to pass on the merits of the film or to determine whether the Board of Review, in applying the Kansas Motion Picture Censorship Law to the film, adopted and applied an unconstitutional interpretation of that law.

The Constitutional Questions

This appeal presents the following questions under the Constitution of the United States:

1. Whether the Kansas Motion Picture Censorship Law subjecting motion pictures to a licensing system which requires advance submission to administrative officials for their judgment as to content is invalid on its face as repugnant to the guarantee of freedom of expression contained in the First Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

2. Whether the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law as applied by the Kansas State Board of Review and affirmed by the Supreme Court of Kansas as a basis for refusing a license for the exhibition of the motion picture entitled "The Moon Is Blue" are by that application given a construction so broad, vague and indefinite as to render such standards, and each of them, invalid as repugnant to the guarantee of freedom of expression con-

tained in the First Amendment, and to the due process clause contained in the Fourteenth Amendment, to the Constitution of the United States.

3. Whether, under the Kansas Motion Picture Censorship Law as construed by the Supreme Court of Kansas, the available judicial review of the action of the Kansas State Board of Review in disapproving films is so inadequate as to render the said law invalid as repugnant to the guarantee of freedom of expression contained in the First Amendment, and to the due process clause contained in the Fourteenth Amendment, to the Constitution of the United States.

The Questions Are Substantial

1. While it is now settled that the content of motion pictures comes within the guarantee of freedom of expression contained in the First Amendment and made applicable to the states by the Fourteenth Amendment (*Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495 (1952); *Gelling* v. *Texas,* 343 U. S. 960 (1952); *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954)), this Court has never decided whether a state may constitutionally apply a system of prior censorship to motion picture films. (See concurring opinion in *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587, 588 (1954).) That question was raised in this case and the Supreme Court of Kansas answered it in the affirmative. In so doing that court has sustained a system of prior restraint upon protected expression—not in terms of time or place or circumstances —but in terms of the content of the motion picture, the idea expressed. This is the classic form of constitutional invalidity. *Near* v. *Minnesota,* 283 U. S. 697, 713 (1931); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Thomas* v. *Collins,* 323 U. S. 516

(1945); and see *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954).

2. Whether the statute as construed and applied to prohibit the exhibition of the film in question prescribes a standard of restraint too vague to satisfy the Constitution presents a substantial question, assuming *arguendo* that prior censorship is not *per se* invalid.

The statute purports to direct the Board to bar exhibition of a picture if it disapproves the picture because it finds that it is "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (Sec. 51-103, G. S. Kan. 1949). In this case the Board found that the film was "obscene, indecent and immoral and such as tend to debase or corrupt morals" (Transcript, p. 20). The Supreme Court of Kansas ruled that the statutory standards were sufficiently definite and clear to satisfy constitutional requirements.

In previous cases this Court has held the following standards to be too indefinite to satisfy constitutional requirements:[2]

(1) "Sacrilegious" as defined by the highest court of New York to mean "that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule." *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495, 504 (1952).

(2) "Of such character as to be prejudicial to the best interests of the people of said City." *Gelling* v. *Texas,* 343 U. S. 960 (1952).

(3) "Immoral" and "tend to corrupt morals," as to which the state court did not agree on a definition. *Commercial Pictures Corporation* v. *Regents,* 305 N. Y. 336, 113 N. E. 2d 502 (1953), reversed 346 U. S. 587 (1954).

[2]See also *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334, 121 N. E. 2d 585 (1954); *RKO Radio Pictures, Inc.,* v. *Department of Education,* 162 Ohio St. 263, 122 N. E. 2d 769 (1954).

(4) "Harmful" (two pictures banned—same ground), *Superior Films, Inc.*, v. *Department of Education*, 159 Ohio St. 315, 112 N. E. 2d 311, 312-313 (1953), reversed 346 U. S. 586 (1954).

The Supreme Court of Kansas considered only the one standard—"obscene". The court found a dictionary definition for the term and found that other courts had held that the term when used in a prohibitory statute was sufficiently definite to justify punishment for violation of such a statute. The court then concluded that under the decision of this Court in the *Burstyn* case, *supra*, it was free to sustain in the abstract the constitutionality of the standard "obscene" as a basis for a system of prior censorship of motion pictures. However, the court held that while in its view "obscene" had a definite meaning, it had no power to review the judgment of the Board as to the meaning to be given that term when applied to a particular motion picture. Consequently, the court affirmed the Board's ruling that "The Moon Is Blue" violates the statutory standards although it is clear that the Board treated all standards in the phrase "obscene, indecent, and immoral and such as tend to debase or corrupt morals" as synonymous without giving any consideration to the restricted meaning of "obscene". Thus the court sanctioned the application of a standard as indefinite as any previously rejected by this Court. The application of that standard to the picture here involved demonstrates that the standard is far too vague and indefinite to satisfy constitutional requirements.

3. Regardless of whether the term "obscene" is a sufficiently definite standard to support a system of prior censorship, assuming *arguendo* that such a system is not invalid *per se*, it is clear that the Kansas Motion Picture Censorship Law as interpreted and applied by the Supreme Court of Kansas is invalid because there is no

adequate judicial review of the decisions of the administrative board. While the Supreme Court found it possible to define the word "obscene" it nevertheless held that it could not review the judgment of the administrative board as to whether a particular film fell within the standard, although it had before it all of the evidence before the Board—namely, a print of the film. In its opinion the Court expressly stated (282 P. 2d at 414, 416, 417; Transcript, pp. 57, 59, 60, *infra*, pp. 17, 21, 22).

> "A court cannot substitute its opinion in place of the board's opinion as to the fitness of a film because our courts do not have such power conferred upon them by the legislature. If this situation is to be changed, it is the duty of the legislature to make the change. It cannot come as a result of a court usurping such power. Neither the district court of Wyandotte county nor this court has the power to substitute its judgment for the administrative discretion of the board. We are fully aware of the necessity of judicial interference where there is an abuse of administrative discretion. To have it any other way would be to destroy the vital marrow of our great concept of government, which is based on three distinct branches—the judicial, the legislative, and the executive. *Mid-West Photo Play Corp.* v. *Kansas State Board of Review,* 102 Kan. 356, 169 P. 1154. No abuse of administrative discretion by the board is here shown.
>
> • • • • • • •
>
> "This line of discussion may affect the merits of a film. However, we do affirmatively and specifically state that this court is not acting in the capacity of supervisor of the board of review. We are not passing on the merits of this or any other film. The legislature granted that power to the board of review and not to the courts, either in the first instance or on appeal.
>
> • • • • • • •

> "In view of what has been said, we are not required to determine how or why our board arrived at its conclusion, or is it necessary here to define other words contained in our censorship statute."

From the foregoing portions of the opinion it is perfectly clear that the Supreme Court of Kansas held that it had no power to consider the merits of the film to determine whether there was any basis whatsoever for the determination of the Board that the film violated the standards set out in the Kansas Motion Picture Censorship Law. As stated by the Supreme Court of Illinois in *American Civil Liberties Union* v. *The City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585, 593:

> "If, as the *Burstyn* case holds, freedom of expression is the rule and limitations upon it the exception, this minimal scope of judicial review, particularly in view of the difficulties inherent in applying the standard of obscenity, does not offer the protection which the constitution requires. * * *"

While we would agree that if any system of prior censorship is valid courts should uphold the judgment of the administrative authority when there is room for an honest difference of opinion, the Constitution does not permit a state to vest the "village tyrants" (*Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943)), the bigot or fanatic seated in the office of the censor with unbridled power completely unrestrained by the courts of law.

Respectfully submitted,

James C. Wilson,
George T. Morton, Jr.

Watson, Ess, Marshall & Enggas,
Of Counsel.

Appendix A

No. 39,699

(Filed April 9, 1955)

HOLMBY PRODUCTIONS, INCORPORATED, and UNITED ARTISTS CORPORATION, *Appellees*, v. MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting The Kansas State Board of Review; HAROLD R. FATZER, Attorney General of the State of Kansas; and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellants*.

SYLLABUS BY THE COURT

1. The Kansas State Board of Review is a creature of the statutes; its administrative power in determining approval or disapproval of films is prescribed in G. S. 1949, 74-2201 to 74-2209; and G. S. 1949, 51-101 to 51-112.

2. Any person aggrieved by an order of the above board has redress in the district court of Wyandotte county, but on appeal that court and the supreme court can exercise only their judicial authority. They cannot, as superior or supreme administrative bodies, substitute their opinions and conclusions for those of the board.

3. The words, "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals," used in the statute (G. S. 1949, 51-103) have an accepted, definite, and clear meaning and furnish no ground for declaring the statute unconstitutional.

4. This court is not passing upon the merits of the film in question for the reason that the only question presented here is limited to the constitutionality of the statute under consideration.

Appeal from Wyandotte district court, division No. 3; HARRY G. MILLER, JR., judge. Opinion filed April 9, 1955. Reversed with directions.

Arthur J. Stanley, Jr., and *Robert H. Bingham*, both of Kansas City, argued the cause, and *Arthur J. Stanley, J. E. Schroeder, L. E. Weeks* and *Leonard O. Thomas*, all of Kansas City, were with them on the briefs for the appellants.

James C. Wilson, of Kansas City, Mo., argued the cause, and *Lee Vaughan*, and *Donald A. Hardy*, both of Kansas City, and *George T. Morton, Jr.*, of Kansas City, Mo., were with him on the briefs for the appellees.

The opinion of the court was delivered by

ROBB, J: This is an appeal from the trial court's order granting a permanent injunction in favor of appellees and enjoining appellants from interference with or penalization of appellees as a result of exhibition of the motion picture, "The Moon is Blue."

The appellants are the Kansas State Board of Review, the attorney general and the county attorney of Wyandotte county. The appellees are Holmby Productions, Incorporated, owners of the film "The Moon is Blue," and United Artists Corporation, sublicensee, as the sole and exclusive distributor of the film throughout the world.

Pursuant to G. S. 1949, 51-102 the film was submitted to the Kansas State Board of Review, a creature of the statutes (G. S. 1949, 74-2201). On June 17, 1953, the board disapproved the film for the reasons,

> "Sex theme throughout, too frank bedroom dialogue: many sexy words; both dialogue and action have sex as their theme."

The board, after this injunction action was filed, reexamined the film and on September 11, 1953, under

authority granted by statute (G. S. 1949, 51-109) again disapproved the film for the reasons,

> "* * * the Board has found that film to be obscene, indecent and immoral, and such as tend to debase or corrupt morals,"

following in the language of the statute (G. S. 1949, 51-103), which further reads:

> "The Board shall examine films, reels, [and] * * * spoken dialogue * * * and shall approve such films, reels, [and] * * * spoken dialogue * * * which are moral and proper; and shall disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals * * *"

The injunction action was filed on August 17, 1953, in the district court of Wyandotte county, pursuant to G. S. 1949, 51-107. All parties to the action filed their respective pleadings, which set up the issues. The case was tried on June 22, 1954. The trial court heard the evidence, viewed the film at the close of the trial, and made findings of fact which, omitting formal matters, were substantially as follows:

Prior to June 17, 1953, there had been a submission and disapproval of the film; there had been some correspondence between the board and the attorney general's office; there had been a reexamination of the film and a final disapproval. The court further found that appellees could secure considerable revenue by exhibiting the film in Kansas.

The trial court made conclusions of law as follows:

The board's action must be upheld unless it was fraudulent or so arbitrary and capricious as to be, in effect, fraudulent: statutory review of the board's action was

not required unless the statute is valid in its present application; motion pictures are protected by the first and fourteenth amendments to the constitution of the United States; the statute providing for censorship is invalid, as repugnant thereto; the board's statements and reasons for its construction of the words of the statute gave each of the words a meaning so broad and vague as to render the statute unconstitutional; and finally, that appellees were entitled to, and the trial court granted, a permanent injunction.

The journal entry in accordance with the findings and conclusions was signed on September 8, 1954.

A motion for a new trial was filed and overruled, a proper notice of appeal was timely filed, and the matter is now here on the following specifications of error:

> "1. The Trial Court erred in overruling, at the close of the plaintiffs' evidence, the defendants' demurrer thereto.
>
> "2. The Trial Court erred in overruling the motion of the defendants for a new trial.
>
> "3. The Trial Court erred in interpreting Kan. G. S. 1949, 51-103, as being unconstitutional in that it is violative of the provisions of the 1st and 14th amendments to the Constitution of the U. S. and Sections 11 and 18 of the Bill of Rights of the Kansas Constitution.
>
> "4. The Trial Court's Conclusions of Law are not supported by its Findings of Fact.
>
> "5. The Trial Court's Findings of Fact are not supported by the evidence."

Our legislature has seen fit, by the statutes quoted, to set up an administrative body, the Kansas State Board of Review, to examine motion picture reels and either approve or disapprove them on the basis prescribed in other statutes. (G. S. 1949, 51-103 to 51-109.) Redress to the

district court of Wyandotte county is also provided for if anyone is aggrieved by an action of the board. The only redress a court can give is one of a judicial nature or power. It is not one of a legislative or administrative nature. A court cannot substitute its opinion in place of the board's opinion as to the fitness of a film because our courts do not have such power conferred upon them by the legislature. If this situation is to be changed, it is the duty of the legislature to make the change. It cannot come as a result of a court usurping such power. Neither the district court of Wyandotte county nor this court has the power to substitute its judgment for the administrative discretion of the board. We are fully aware of the necessity of judicial interference where there is an abuse of administrative discretion. To have it any other way would be to destroy the vital marrow of our great concept of government, which is based on three distinct branches—the judicial, the legislative, and the executive. (*Photo Play Corporation* v. *Board of Review,* 102 Kan. 356, 169 Pac. 1154.) No abuse of administrative discretion by the board is here shown.

The only question before us, then, is whether the statutes under consideration are unconstitutional because they are an abridgment or contravention of the first and fourteenth amendments to the constitution of the United States, or because they are couched in language so vague and indefinite as to offend due process.

We will first determine whether the words, "obscene, indecent, or immoral, or such as tend to debase or corrupt morals," are vague and indefinite terms so as to offend due process. We are of the opinion these words have an accepted, definite, and clear meaning.

Under G. S. 1949, 77-201, *Second,* we find the following:

> "Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meanings."

In applying this standard to the words "obscene," we find the following definition in Black's Law Dictionary, 4th ed.:

> "Offensive to chastity of mind or to modesty, expressing or presenting to the mind or view something that delicacy, purity, and decency forbids to be exposed; offensive to modesty, decency, or chastity; impure, unchaste, indecent, lewd; offensive to senses; repulsive; disgusting; foul; filthy; calculated to corrupt, deprave, and debauch the morals of the people, and promote violation of law; of such character as to deprave and corrupt those whose minds are open to such immoral influences; calculated to lower that standard which we regard as essential to civilization or calculated, with the ordinary person, to deprave his morals or lead to impure purposes; licentious and libidinous and tending to excite feelings of an impure or unchaste character; having relation to sexual impurity; tending to stir the sex impulses or to lead to sexually impure and lustful thoughts; tending to corrupt the morals of youth or to lower the standards of right and wrong especially as to the sexual relation. *Parmelee* v. *United States,* 72 App. D. C. 203, 113 F. 2d 729, 730." (p. 1227.)

In 33 Am. Jur., §4, p. 17, we find the following:

> "Obscenity was indictable at common law, on the ground that what tended to corrupt society amounted

> to a breach of the peace, and various acts and forms of obscenity are made criminal offenses by statute or ordinance. The word obscenity cannot be said to be a technical term of the law and is not susceptible of exact definition in its judicial uses, although it has been defined in a general sense as meaning offensive to morality or chastity, indecent, or nasty."

See, also, 67 C. J. S. 19.

In *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 184, we find the following definition:

> "The meaning of the word 'obscene' as legally defined by the courts is: Tending to stir the sex impulses or to lead to sexually impure and lustful thoughts. [Citations.]
>
> "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law." (p. 184.)

The above opinion, which allowed the book in question to be admitted to the United States, was affirmed in *United States* v. *One Book Entitled Ulysses,* 72 F. 2d 705. (See, also, 29 Words and Phrases, perm. ed., p. 68, *et seq.*)

The supreme court of the United States has made great strides in cases of this type. The most far-reaching has been the case of *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, wherein the same type of proceedings as we have in the case at bar was reviewed. It is well to note, however, that the supreme

court has not gone as far as Mr. Justice Douglas did in his concurring opinion (in which Mr. Justice Black concurred) in *Superior Films* v. *Dept. of Education,* 346 U. S. 587, 98 L. Ed. 329, 74 S. Ct. 286, where it was said:

> "In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step.
>
> "In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor" (p. 589).

In the Burstyn case the court held the statute unconstitutional for the reason that it gave a review board authority to disapprove a movie because it was "sacrilegious." The result created by reason of such censorship caused the court to declare the statute in conflict with the first and fourteenth amendments to the federal constitution. That court considered only the constitutionality of the statute. Nowhere has it appeared in any case cited, or in any found by us, that a court has set itself up as a glorified and superior board of review. The Burstyn case, which was written in 1952, referred to the fact that a different attitude has been displayed by the court since the advent of sound pictures, which demonstrates that courts are ever mindful of the march of progress.

The supreme court of the United States in the Burstyn case stated that the constitution does not require absolute freedom to exhibit every motion picture of every kind. This same rule applies to other media of communication so the conclusion reached is that each method or media of expression presents its own peculiar problems. Spoken words with emphasis placed thereon by the speaker may

tend to shock the listener while those same words on the printed page may have little or no effect on a reader. Dialogue in a dramatic exhibition when taken into consideration with surrounding circumstances and activity may excite the human senses while the same dialogue on paper with the cleverest descriptive words to show circumstances and activity might create an entirely different reaction. This line of discussion may affect the merits of a film. However, we do affirmatively and specifically state that this court is not acting in the capacity of supervisor of the board of review. We are not passing on the merits of this or any other film. The legislature granted that power to the board of review and not to the courts, either in the first instance or on appeal.

Appellees raise the question that the application of this statute results in previous censorship, or restraint. We will briefly touch thereupon. We point again to language in the Burstyn case where, quoting from *Near* v. *Minnesota,* 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625, it was said:

> " 'The protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' " (p. 503-504.)

In the Near case, supra, Mr. Chief Justice Hughes further stated:

> "* * * the protection even as to previous restraint is not absolutely unlimited * * * No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds,* the primary requirements of decency may be enforced against obscene publications." (Our italics.) (p. 716.)

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. ed., 1031, 62 S. Ct. 766, Mr. Justice Murphy stated:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (p. 571-572.)

Since the Burstyn case was cited by both appellee and appellant, we feel that reference thereto is appropriate, especially to that part reading as follows:

> "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'" (p. 505-506.)

In the Burstyn case the court, by the terminology above used, excepted censorship of a film for the reason it was "obscene", which was one of the grounds enumerated by the Kansas board for its disapproval of "The Moon Is Blue." In view of what has been said, we are not required to determine how or why our board arrived at its conclusion, or is it necessary here to define other words contained in our censorship statute.

The decree of the trial court is reversed with directions to reinstate the order of the Kansas State Board of Review.

Appendix B

In the District Court of Wyandotte County, Kansas,
Division No. 3

Holmby Productions, Inc., and United Artists Corporation, Plaintiffs, vs. Mrs. Frances Vaughn, Mrs. J. R. Stowers and Mrs. Bertha Hall, constituting The Kansas State Board of Review, et al., Defendants.	No. 87943-A

Stanley, Stanley Schroeder, Weeks & Thomas,
Attn. Mr. A. J. Stanley, Jr.,
Brotherhood Building,
Kansas City, Kansas.
Williamson, Cubbison & Vaughan,
Attn. Mr. Donald Hardy,
Title Bldg.,
Kansas City, Kansas.

Gentlemen:

In this case, the plaintiffs have appealed from the order of the defendant Kansas State Board of Review in refusing to grant a license to exhibit the film "The Moon Is Blue", and have asked for certain injunctive relief. The plaintiffs raise the grounds that the action of the board was arbitrary and capricious, that it violates

Sections 11 and 18 of the Bill of Rights of the Kansas ~~Moon Is Blue", and have asked for certain injunctive~~ Constitution, and that it violates the 1st and 14th Amendments to the Constitution of the United States.

If the Kansas statute involved herein violates the 1st and 14th Amendments to the United States Constitution as interpreted by the Supreme Court of the United States, then this court is bound by its rulings. On this question, both parties agree that the case of *Burstyn* v. *Wilson,* 343 U. S. 495, is controlling. But both sides disagree on the effect of that case.

Defendants urge that the Burstyn case does not condemn censorship *per se,* but specifically reserves to the states a limited field in which decency and morals may be protected by prior censorship of moving pictures, and that since the constitutionality of the Kansas Statute of 1913 setting up substantially the same standards was upheld by the United States Supreme Court in *Mutual Film Corp.* v. *Hodges,* 236 U. S. 248, that decision should govern here.

However, the last cited case was decided in 1955 as a companion case to *Mutual Film Corporation* v. *Industrial Comm. of Ohio,* 236 U. S. 230. The two cases were argued jointly and submitted on the same briefs, and the Supreme Court in its decision applied the same reasoning in both cases (236 U. S., l. c. 258).

The Ohio case is expressly repudiated in the Burstyn case insofar as it is out of harmony with the views set forth in the Burstyn case (343 U. S., l. c. 502), and it would seem therefore that *Mutual Film Corp.* v. *Hodges,* the Kansas case, must be held to be likewise repudiated.

As I interpret the Burstyn case, the court has not declared prior censorship of movies to be invalid *per se.* There is apparently reserved to the states a very limited

field within which prior censorship may validly operate to protect decency and morals. But, the statute under which such censorship is authorized must provide specific and definitive standards and measures for ascertaining what is to be the subject of censorship. Without these standards, the statute or ordinance offends the 1st and 14th Amendments to the United States Constitution and is invalid. The question then is whether or not the Kansas statute provides proper standards and measures.

G. S. 1949, 51-103, provides that the Board shall disapprove such films as are,

> "• • • cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals • •."

The Board in this case refused to license "The Moon Is Blue" on the grounds that it was "obscene, indecent and immoral and such as tends to debase or corrupt morals."

In *Commercial Pictures Corp.* v. *Board of Regents,* 113 N. E. (2) 502 (1953 N. Y.), the majority of the Court of Appeals of New York held that the words "Immoral" and "tend to corrupt morals" in the New York statute provided a sufficiently definite standard, and upheld the action of the censor board in refusing to license a film. The Supreme Court of the United States in *Commercial Pictures Corporation* v. *Regents of the University of the State of N. Y.,* 74 S. Ct. Rep. 286, reversed on the authority of the Burstyn case. The obvious conclusion, as I see it, is that the words "immoral" and "tend to corrupt morals" did not provide a sufficiently definite standard to meet the approval of the court.

Counsel for defendants has urged that there still remains the words "obscene and indecent" in the Kansas statute which are sufficiently definite to uphold the statute, and cites several cases in which the word "ob-

scene" as used in other statutes has been defined and approved by the courts.

This same argument was presented to the New York Court of Appeals in the last cited case, and also to the Supreme Court of Ohio in *Superior Films* v. *Dept. of Education,* 112 N. E. (2) 311 (Ohio 1953). In these cases the majority held that the words of the statute had acquired precision from the sense and experience of men. The Supreme Court of the United States examined these arguments on appeal and rejected them. Thus the argument is foreclosed here.

If the words "immoral" and "tend to corrupt morals" is not sufficient to meet the test of definiteness, then in my opinion, the words "obscene and indecent" are likewise insufficient.

It is my opinion, therefore, that the absence from the statute involved here of specific and definitive standards and measures permits the Board of Review to apply the act in accordance with their own personal and individual concepts of what is "obscene, indecent and immoral," or such as tend to "debase or corrupt morals." As I see it, this is no longer permitted.

It is, therefore, the judgment of this court that the present statute is unconstitutional for the reason that it violates the 1st and 14th Amendments of the Constitution of the United States as these amendments are construed by the Supreme Court of the United States. Since this disposes of the case, there is no need to rule on the other contentions raised by the parties.

Judgment is therefore entered in favor of plaintiffs. Will you please submit a journal entry for my signature.

Done this 14th day of July, 1954.

/s/ Harry G. Miller, Jr.
Judge of Division No. 3.

Appendix C

In the District Court of Wyandotte County, Kansas
Division Number Three

Holmby Productions, Inc., and United Artists Corporation, Plaintiffs, vs. Mrs. Frances Vaughn, Mrs. J. R. Stowers, and Mrs. Bertha Hall, constituting the Kansas State Board of Review; Harold R. Fatzer, Attorney General of the State of Kansas; and Donald E. Martin, County Attorney of Wyandotte County, Kansas, Defendants.	No. 87943-A

Findings of Fact

The Court makes the following findings of fact:

1. Plaintiff Holmby Productions, Inc., is the producer, and plaintiff United Artists Corporation is the distributor, of the motion picture film entitled "The Moon Is Blue".

2. Defendants Mrs. Frances Vaughn, Mrs. J. R. Stowers, and Mrs. Bertha Hall constituted The Kansas State Board of Review (hereinafter called the Board) at the time when this action was commenced, and during the whole of the relevant period of time prior thereto.

3. Defendant Harold R. Fatzer was at the time when this action was commenced, and during the whole of the

relevant period of time prior thereto, and now is, the Attorney General of the State of Kansas.

4. Defendant Donald R. Martin was at the time when this action was commenced, and during the whole of the relevant period of time prior thereto, and now is, the County Attorney of Wyandotte County, Kansas.

5. Prior to June 17, 1953, plaintiff United Artists Corporation submitted a print of the motion picture film entitled "The Moon Is Blue" to the Board for censorship under the Motion Picture Censorship Law.

6. On June 17, 1953, Mrs. Frances Vaughn, the Chairman of the Board, advised plaintiff United Artists Corporation that the Board had disapproved the motion picture film entitled "The Moon Iis Blue", giving as the Board's reasons for such disapproval "sex theme throughout", "too frank bedroom dialogue", "many sexy words", and "both dialogue and action have sex as their theme".

7. The Board, under date of July 7, 1953, wrote the Attorney General of Kansas inquiring as to whether, under the laws of Kansas, it was possible for the Board to give a restricted approval which would permit the film to be shown to adults while prohibiting its showing to children. The Attorney General, by letter dated July 10, 1953, advised the Board, in effect, that it could only approve or disapprove a film, and that no restricted approval was possible.

8. This action was commenced on August 17, 1953.

9. After the commencement of this action, the Board reexamined the motion picture film entitled "The Moon Is Blue", and after such reexamination, Mrs. Frances Vaughn, the Chairman of the Board, advised plaintiff United Artists Corporation on September 11, 1953, that the Board had found said film to be "obscene, indecent

and immoral, and such as tend to debase or corrupt morals" and that the Board had again disapproved said film.

10. The Board had the same objections to the motion picture film entitled "The Moon Is Blue" after each of its two examinations and its finding that the said film was "obscene, indecent and immoral, and such as tend to debase or corrupt morals" was based upon the reasons for disapproval given in the Board's letter of June 17, 1953.

11. The motion picture industry maintains an examining agency known as "The Breen Office." That agency issues seals of approval to films submitted to it by the producers and found by it to be suitable for showing to the public. The film "The Moon Is Blue" was submitted by its producer, or owner, to this agency, which, after viewing it, denied its seal of approval.

12. The defendants Harold R. Fatzer, the Attorney General of the State of Kansas, and Donald E. Martin, the County Attorney of Wyandotte County, Kansas, will enforce the penal provisions of the Motion Picture Censorship Law against plaintiff United Artists Corporation if it should license the motion picture film entitled "The Moon Is Blue" for exhibition in their respective jurisdictions without the Board's certificate of approval for said film, and against any exhibitor who might exhibit the said film in their respective jurisdictions under the same circumstances.

13. If the motion picture film entitled "The Moon Is Blue" might lawfully be exhibited in the State of Kansas, plaintiff United Artists Corporation could secure a considerable revenue for itself and for plaintiff Holmby Productions, Inc., from licensing the said film for exhibition by numerous exhibitors operating motion picture theaters

in the said state, including exhibitors operating motion picture theaters in Wyandotte County, Kansas.

14. Trial of this case was had on June 22, 1954, and on that date the Court, by agreement of counsel, viewed the film entitled "The Moon Is Blue". The film and the script of the dialogue were offered and admitted in evidence.

Conclusion of Law

The Court concludes as matters of law:

1. On statutory review of the Board's action pursuant to Section 51-107, General Statutes of Kansas, 1949, the Board's decision must be upheld unless it was fraudulent, or so arbitrary and capricious as to be, in effect, fraudulent.

2. Statutory review of the Board's action pursuant to said Section 51-107 is not required herein, however, and would be wholly without point unless the Motion Picture Censorship Law (Sections 51-101 through 51-112 and 74-2201 through 74-2208, General Statutes of Kansas, 1949) is valid in its present application.

3. Motion pictures are a form of expression within the protection of the First and Fourteenth Amendments to the Constitution of the United States.

4. A state statute providing for censorship of motion pictures which has the effect of vesting in a censor an unlimited restraining control over the content of motion pictures is invalid, as repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

5. The construction by the Board in its decision here under review of the words "obscene," "indecent," "immoral," and "such as tend to debase or corrupt morals," as used in Section 51-103, General Statutes of Kansas, 1949, by its statement of reasons for disapproval, and by its finding that the content of the motion picture film

entitled "The Moon Is Blue" is obscene, indecent, immoral and such as tend to debase or corrupt morals, gives to each of those words a meaning so broad and vague as to render it unconstitutional as a basis for censorship, for the reason stated in Conclusion No. 4, above.

6. The plaintiffs are entitled to an injunction enjoining the defendants, and each of them, from in any manner interfering with, or penalizing, the licensing and exhibition of the motion picture film entitled "The Moon Is Blue."

Statement Pursuant to Rule 52

Pursuant to Rule 52 of the Supreme Court of the State of Kansas, the Court states that in reaching its decision in the above entitled case it recognized the presumptions of law urged by the defendants and gave effect to them as follows:

1. With respect to the presumptions numbered 1, 2, and 4, the Court placed upon the plaintiffs the burden of proof upon every issue in this case, and, in addition, required the plaintiffs to make the invalidity of the Motion Picture Censorship Law clearly appear, before determining the issues in favor of the plaintiffs.

2. With respect to the presumption numbered 3, the Court recognized the rule that it should adopt whatever construction of the Motion Picture Censorship Law, fairly open to it, would sustain the validity of the statute. No alternate construction, under which the Motion Picture Censorship Law would be valid, appeared to the Court to be fairly open for adoption herein.

_____

Judge of Division Number Three
Wyandotte County District Court.

Dated this .... day of September, 1954.

Appendix D

The statute, the validity of which was drawn in question, is the Motion Picture Censorship Law of the State of Kansas, Secs. 51-101 through 51-112, and Secs. 74-2201 through 74-2209, G. S. Kan. 1949, which read as follows:

51-101. Definition of terms. That the word "film" used in this act means what is usually known as the motion picture film. The word "reel" as used in this act means one thousand feet of film, or fraction thereof. The word "person" when used in this act also means an association, copartnership, or a corporation.

51-102. Submission of films to board of review; executory contracts, conditions in. It shall be unlawful for any person to sell, lease, lend, exhibit or use any motion picture film or reel in Kansas unless the said film or reel has been submitted by the exchange owner or lessee of the film or reel and duly approved by the Kansas board of review, hereinafter in this act called the board: *Provided,* This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or reel but the performance of such contract shall be conditioned upon the approval of the film or reel by said board of review at the time of delivery.

51-103. Examination of films, dialogue, and advertising; news reels exempt. The board shall examine films, reels, including subtitles, spoken dialogue, songs, other words or sounds, folders, posters and advertising matter used in connection therewith to be exhibited or used in Kansas; and shall approve such films, reels, including subtitles, spoken dialogue, songs, other words or sounds, folders, posters and advertising matter which are moral and proper; and shall disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt

morals; *Provided, however,* That the provisions of this act shall not be construed to apply to any reel or film which is strictly pictorial news of the day and commonly called "news reel," and no such examination or approval shall be required by said board prior to the release or circulation of any such "news reel."

51-104. Approval certificate; form of display. The board of review shall furnish a certificate of approval for the film or reel approved by it, but it shall not be necessary for such approval to be stamped upon the film or reel, but the proprietor of every moving-picture theater or other performance at which any reel or film is displayed shall by appropriate slide or film display upon the screen his certificate that the film or reel used in said performance has been approved by the Kansas state board of review. Such certificate shall be in substantially the following form: "The management certifies that the film or reel displayed in this theater has first been approved by the Kansas state board of review." Such certificate, when projected upon the screen, shall be not less than three feet high nor less than six feet in length, the lettering shall be plain and of such size as to be easily read from the most remote portion of said theater and shall be displayed for not less than thirty seconds continuously at each performance or exhibition and not less than once in each two hours of continuous performance or exhibition.

51-105. Records of state board of review. The board shall keep a record of all examinations made by it of films, or reels, noting on the record such as have been approved, and those that have not been approved with the reason for such disapproval, and the board shall classify films for special programs.

51-106. Examination fees. For the examination of each film the board shall receive, in advance, a fee of not to

exceed two dollars for each reel approved or censored, whether original or copies. All fees so received by the board shall be paid monthly into the state treasury, and are hereby appropriated for the payment of the salaries and expenses of the board and their assistants. The board shall have authority to reduce, from time to time, the examination fee below the maximum aforesaid, if and when the fees collected shall be more than sufficient to pay all of the salaries, charges and expenses connected with the carrying out of the provisions of this act.

51-107. Offices of board of review; appeals from board. The office of the board provided for in this act shall be in Kansas City, Kansas, and any person, company or corporation aggrieved by the action thereof, may have redress in the district court of Wyandotte county in this state, in which service may be had upon the board or any member thereof by commencing proceedings therein within sixty days from the action of the board complained of by such person, company or corporation: *Provided, however,* That the beginning or pending of any such proceedings shall not abate or suspend the action of the board until the final disposition of such proceedings by the court.

51-108. Entry of theaters; unapproved pictures and advertisements. Any member of the board, or any inspector of the state of Kansas whom the board of review may delegate as its inspector for the time being or for a particular purpose, in writing, may enter any place where films or reels are exhibited, and such board member or inspector is hereby empowered and authorized to prevent the display or exhibition of any film, reel, or any banner or poster used in connection therewith, which has not been duly approved by the board.

51-109. Reexamination of films; notice to owner. The board may order a reexamination of any film, or reel, approved by it, upon giving 30 days' written notice to the owner of said film or reel. At such reexamination the board may make such order as would be proper upon the original examination.

51-110. Special exhibition permit. The board may, in its discretion, grant a special permit for the exhibition of a film, or reel, for purely educational, charitable or religious purpose, without fee.

51-111. Penalties for violating act or regulations. Any person violating any provision of this act or any rule or regulation of the board, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $25 for the first offense, and not less than $100 nor more than $500 for each succeeding offense, or by imprisonment for thirty days in the county jail. Each day an uncensored film, or reel, is exhibited shall be deemed a separate offense.

51-112. Penalty for exhibiting prohibited films and advertisements; confiscation. Any person exhibiting in public any misbranded film, or any film carrying the official approval of the board, which approval was not put there by action of the board, or any prohibited by the ordinances of any city, or any person who shall exhibit any folders, posters, pictures or other advertising matter which has not been approved by said board, or which is indecent, profane or scandalous, or which tend to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the board shall, upon conviction, be deemed guilty of a misdemeanor, and punished by a fine of not more than $50 or by imprisonment in the county jail for not over 30 days and the said misbranded film may be seized and confiscated.

74-2201. Appointment; qualifications; terms; removal. The Kansas state board of review shall consist of three resident citizens of Kansas, well qualified by education and experience to act as censors under this act. They shall be appointed by the governor, one member of the board shall be appointed for one year, one for two years and one for three years. Each year thereafter one member shall be appointed for a full term of three years. The governor, at his pleasure, may remove a member of said board for incompetency or neglect of duty.

74-2202. Vacancies. A vacancy in the membership of the board shall be filled by the governor for the unexpired term A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the board.

74-2203. Seal. The board shall procure and use an official seal, which shall contain the words "Kansas State Board of Review," together with such design engraved thereon as the board may prescribe.

74-2204. Reports. The board shall report to the governor in writing such information as he may request concerning its work.

74-2205. Chairman, bond; oaths, salaries and expenses. The governor shall designate one of said board as chairman, and such person shall be administrative head of the board, shall receive and be responsible for all moneys paid to the board, shall give bond to the state of Kansas in the sum of $3,000 with security to be approved by the governor, conditioned for the faithful performance of the duties. Each member of the board shall take and subscribe an oath to perform the duties thereof. The chairman of the board shall receive an annual salary of twenty-four hundred dollars, and each of the other members of the board shall receive an annual salary of twenty-one hun-

dred dollars together with such necessary traveling expenses incurred in carrying out the provisions of this act, and the secretary of the board is to be appointed by the board, in accordance with the provisions of the civil service law. Salaries shall be paid monthly on vouchers.

74-2206. Employees. The board shall appoint with the approval of the governor such clerks as may be necessary, and fix the compensation thereof, such employees to hold office during the pleasure of the board.

74-2207. Offices in Kansas City. The executive council shall provide adequate offices in the city of Kansas City, Kansas, also proper equipment, furniture and supplies for the work of the board, said offices to be furnished free of charge by the city of Kansas City, Kansas.

74-2208. Rules and regulations. The board may make and adopt such reasonable rules and regulations as it may deem necessary, not inconsistent with the laws of the state, for enforcing the provisions of this act.

74-2209. Fees and moneys of board. The state treasurer and auditor of state shall credit ten per cent of all the fees remitted into the state treasury by the Kansas board of review in pursuance of chapter 308 [**51-101 to 51-112, 74-2201 to 74-2208**] to the Session Laws of 1917, and all acts amendatory or supplemental thereto, to the general revenue fund of the state to reimburse said fund for the expenses of printing, legal advice, auditing and handling of accounts and funds and all other general expenses which are paid out of the general revenue fund but which are properly chargeable to the Kansas board of review department; the remaining ninety per cent of the said fees shall be by the state treasurer and auditor of state placed into a special fund to the credit of the said Kansas board of review.

FILED
SEP 22 195
HAROLD B. WILLEY,

No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*,

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, Constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

HAROLD R. FATZER,
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PAUL E. WILSON,
Assistant Attorney General,
DONALD E. MARTIN,
County Attorney of Wyandotte County, Kansas,
Attorneys for Appellees.

28-1624

INDEX

PAGE

MOTION TO DISMISS 3

THE ORDER IS NOT FINAL 4

THE QUESTIONS ARE NOT SUBSTANTIAL 5

A. The Alleged Deficiency in Standards has been Remedied by Regulation 5

B. The Standard "Obscene" has a Fixed and Objective Meaning 7

C. The Constitutionality of the Statute here under Attack is *Res Adjudicata* 9

D. The Judicial Review Afforded by the Kansas Statute is Adequate 10

CONCLUSION 12

TABLE OF STATUTES, CASES AND AUTHORITIES

STATUTES:

Section 1257 of Title 28 U. S. C. 4

51-107 G. S. Kans. 1949 10

74-2208 G. S. Kans. 1949 5

CASES:

American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N. E. 2d 585 11

Burstyn v. Wilson, 345 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 8

Chaplinsky v. New Hampshire, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1034, 1035, 62 S. Ct. 766 7

Holmby Productions, Inc., *et al.* v. Vaughn, *et al.*, 177 Kan. 728, 282 P. 2d 412 4

Near v. Minnesota, 283 U. S. 697, 716, 75 L. Ed. 1357, 1367, 51 S. Ct. 625 8

Mutual Film Corporation v. Hodges, 236 U. S. 248, 59 L. Ed. 561 9

Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U. S. 230, 59 L. Ed. 552 9

Photoplay Corp. v. Board of Review, 102 Kan. 356, 169 P. 1154 11

PAGE

Rice v. Sioux City Memorial Park, Inc., *et al.*, ——— U. S. ———, 75 S. Ct. 614 4
Swearingen v. U. S., 161 U. S. 446, 40 L. Ed. 765 7
U. S. v. Harmon, 45 Fed. 414 7
U. S. v. Two Obscene Books, 99 Fed. Supp. 760 7

AUTHORITIES:

Rule No. 16, Rules of the Supreme Court of Kansas 4

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 338

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants,*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, Constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss or affirm on the grounds that the order from which the appeal is taken is not a final order and for the further reason that the questions presented are so unsubstantial as not to need further argument.

THE ORDER IS NOT FINAL

Section 1257 of Title 28 U. S. C. authorizes review in this Court of

> "*Final* judgment or decree rendered by the highest court of any state in which a decision could be had . . ." (emphasis supplied.)

Rule No. 16 of the Rules of the Supreme Court of the State provides in part:

> "Motion for a rehearing or for a modification of the judgment . . . may be filed within 20 days after the decision. . . ."

The record in *Holmby Productions, Inc., et al. v. Vaughn, et al.*, 177 Kan. 728, 282 P. 2d 412, does not reveal that motion for rehearing or other post-decision motion was filed by the appellants herein. Appellees respectfully suggest that the order appealed from is not final for the reason that appellants have failed to avail themselves of all remedies and procedures to which they were entitled under the rules of the Supreme Court of the State of Kansas. Hence, appellees urge the dismissal of said case.

THE QUESTIONS ARE NOT SUBSTANTIAL

A. The Alleged Deficiency in Standards has been Remedied by Regulation

The appellants allege that the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law as applied by the Kansas State Board of Review and affirmed by the Supreme Court of Kansas in the instant case are by that application given a construction so broad, vague and indefinite as to render such standards and each of them invalid as violative of constitutional guarantees. Assuming *arguendo* that the contention made by appellants is sound with respect to the instant case, appellees respectfully submit that any lack of definiteness in the statutory standards has been remedied by regulations adopted by the Kansas State Board of Review since the inception of this litigation.

Section 74-2208 of the General Statutes of Kansas, 1949 provides:

> "The board may make and adopt such reasonable rules and regulations as it may deem necessary, not inconsistent with the laws of the state, for enforcing the provisions of this act."

Pursuant to the foregoing authority the board has adopted regulations limiting and defining the statutory standards of

censorship. These regulations, effective on March 15, 1954, are as follows:

"18-1-22. Within the meaning of G. S. 1949, 51-102, a film or reel shall be deemed cruel, obscene, indecent or immoral when:

"(*a*) Said film or reel expressly or impliedly presents as desirable, acceptable or proper patterns of behavior, acts relating to sex which constitute felonies or misdemeanors under the laws of this state.

"(*b*) Either the theme or its manner of presentation, or both, present sex relations as desirable, acceptable or proper pattern of behavior between persons not married to each other.

"(*c*) It portrays explicitly or in detail an act of adultery, fornication, rape or seduction.

"(*d*) It portrays nudity or a simulation thereof, partial nudity which is sexually immoral, sexual relations of any kind, or actual human birth, or if it presents scenes portraying sexual hygiene, sex organs, abortion, methods of contraception or venereal disease. (Authorized by G. S. 1949, 74-2208; Effective March 15, 1954.)

"18-1-23. Within the meaning of G. S. 1949, 51-103, a film or reel shall be deemed such as tends to debase or corrupt morals when:

"(*a*) The theme or manner of its presentation is of such character as to present the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior; or

"(*b*) If it advocates or teaches the use of, or the

methods of use of, narcotics or habit forming drugs. (Authorized by G. S. 1949, 74-2208; Effective March 15, 1954.)"

In view of this action of the Board of Review, in defining and limiting the statutory standards for censorship, the instant case, when "put into proper focus," assumes only isolated significance, and does not merit review in this Court (Rice v. Sioux City Memorial Park, Inc., et al., _____ U. S. _____, 75 S. Ct. 614.

765; *U. S. v. Harmon*, 45 Fed. 414; *U. S. v. Two Obscene Books*, 99 Fed. Supp. 760.)

The decisions of this Court suggest the propriety of censorship on the basis of obscenity.

In *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1034, 1035, 62 S. Ct. 766, where the Court unanimously declared:

> "That in certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or fighting words . . ."

And in *Near v. Minnesota,* 283 U. S. 697, 716, 75 L. Ed. 1357, 1367, 51 S. Ct. 625, the Court affirmed that "the primary requirements of decency may be enforced against obscene publications." No question concerning the soundness of the rule is raised in *Burstyn v. Wilson,* 345 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777. There the Court comments specifically:

> "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent a showing of obscene films."

We infer that the Court has specifically excluded the standard "obscene" from the rule applied in the Burstyn case. We also note that in *American Civil Liberties Union, et al., v. City of Chicago, et al.,* 3 Ill. 2d 334, 121 N. E. 2d 585, a case upon which the appellants rely extensively, the Court found:

> "The term 'obscene' has achieved a sufficiently precise meaning to describe a class of motion pictures which the state may validly suppress." (Syl. 5.)

Hence we perceive no valid argument that the term "obscene" lacks definiteness and meaning.

Moreover, the record reflects that this concept entertained is by the Kansas Board of Review a certain one. In

the trial court plaintiffs there and appellants here, called the Chairman of the Board of Review as their witness. Upon interrogation as to the Board's understanding of the term "obscene" the following definition was given:

> "Any thing would be obscene that would advocate lewdity between the sexes, between men and women, especially in the sex line and would tend to show, especially young people, that such an attitude was the correct and accepted method, code of life, as this picture would in our opinion." (T. 34.)

C. The Constitutionality of the Statute here under Attack is *Res Adjudicata*

The Kansas statute providing a system of motion picture censorship was subjected to attack on constitutional grounds similar to those involved in the case of *Mutual Film Corporation v. Hodges*, 236 U. S. 248, 59 L. Ed. 561. The form of the statute then was substantially identical with the present statute. In the Mutual Film case, and a companion case from Ohio (*Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552), the statute was specifically approved by this Court. While it is conceded that the Burstyn case has modified substantially the opinion in the Mutual Film cases, there is nothing in the majority opinion in the Burstyn case which would suggest that the Court now entertains a notion that a system of pre-

censorship is *per se* unconstitutional. Indeed the contrary appears to be the case. The Court comments:

> "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rule governing any other particular method of expression. Each method tends to present its own peculiar problem." (Pp. 504-505.)

And further

> ". . . it is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute . . ."

Inasmuch as the Mutual Film cases have established this Court's approval of the Kansas statute, and in view of the fact that in the Burstyn case, this Court specifically declined to condemn precensorship of motion pictures, we suggest that the statute here under attack has the specific sanction of the precedents of this Court.

D. The Judicial Review Afforded by the Kansas Statute is Adequate

Section 51-107 of the General Statutes of Kansas provides in part:

> "The office of the board provided for in this act shall be in Kansas City, Kansas, and any person, company or corporation aggrieved by the action thereof, may have redress in the district court of Wyandotte county in this state, in which service may be had upon the board or any membr thereof by commencing proceedings therein within sixty days from the action of the board complained of by such person, company or corporation: . . ."

Consistent with the classic concept of judicial review, the Kansas Courts have determined that judicial inquiry should go only to the question of whether the action of the Board was arbitrary and capricious, and that the Court will not substitute its discretion for that of the Board with respect to the merit of the film under consideration. Such review has been determined to afford due process of law. (*Midwest Photoplay Corporation v. Board of Review*, 102 Kan. 356, 169 P. 1154.) That the conclusion of the Kansas Court is supported by the precedents of other courts is too well known to require further citation.

Appellants rely upon the decision of the Illinois Supreme Court in the case of *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585. We submit that the rule there is inconsistent with the preponderance of authority. Hence, we make no effort to reconcile the Illinois case with the position of the Kansas Court. We

simply elect to stand with the overwhelming weight of authority that the review afforded by the Kansas statute as interpreted by the Supreme Court meets all of the requirements of due process.

CONCLUSION

For the reasons hereinbefore set forth, appellees respectfully urge that the within case should be dismissed or affirmed.

HAROLD R. FATZER,
Attorney General,
PAUL E. WILSON,
Assistant Attorney General,
DONALD E. MARTIN,
County Attorney of Wyandotte
County, Kansas,
Attorneys for Appellees.

□

26-1024

FILED
OCT 6 1955
HAROLD B. WILLEY,

No. 338

In the Supreme Court of the United States

October Term, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees*

On Appeal from the Supreme Court of the State of Kansas

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

October Term, 1955

No. 338

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees*

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

This Appeal Is Taken From a Final Judgment

Appellees contend that this Court does not have jurisdiction to review the judgment of the Supreme Court of Kansas because that judgment was not final for the sole reason that appellants failed to avail themselves of the opportunity to file a motion for rehearing or modification

of the judgment within twenty days after its rendition, as permitted by Rule 16 of the Supreme Court of Kansas. The argument is completely without merit. *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551-2 (1945). In *Southern Ry. Co.* v. *Clift,* 260 U. S. 316, 319 (1922), this Court said in regard to a similar argument: "The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation."

II

The Questions Presented Are Substantial

A. The Subsequent Administrative Regulations in No Way Serve to Cure the Deficiency in Standards

The motion picture "The Moon Is Blue" was disapproved by the Kansas State Board of Review for the second and final time on September 11, 1953 (Transcript pp. 18, 20). Appellees argue in their motion (pp. 5-7) that any deficiency in the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law has been cured by the March 15, 1954, amendment to the regulations of the Board. The fact remains that the Board, after twice viewing the film in question, denied appellants a certificate of approval to exhibit it in the State of Kansas and has not to this date changed that ruling by tendering such a certificate despite the pending litigation. The point of this case is that the Kansas Motion Picture Censorship Law, *as construed and applied to the film "The Moon Is Blue"*, is unconstitutional. The mere writing of words and regulations does not change the statutory construction which is involved in this case.

It should be noted that the administrative regulations do not purport to constitute an exclusive list of grounds

for disapproval of motion pictures and therefore the Board is still free to exercise the broadest authority conferred upon it by statute. In addition, it is apparent from the fact that the regulations referred to by appellees were put into effect on the eve of the trial of this case that the Board feels free to change its regulations at any time.

Furthermore, administrative regulations do not suffice to make valid a statute which fails to meet the constitutional tests as to definiteness of standards for administrative action. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).

B. The Mere Inclusion of the Word "Obscene" in the Statutory Standards Does Not Satisfy Constitutional Requirements

Appellees in arguing (pp. 7-9) that the standard "obscene" has a fixed and objective meaning, do not meet the issue before this Court. Whether "obscene" is subject to being construed with sufficient definiteness to serve as a standard for censorship is not the question. The question before this Court is whether the standard "obscene", when applied as a basis for the disapproval of the motion picture "The Moon Is Blue", is thereby rendered so vague and indefinite as to deprive it of constitutional validity. Furthermore, appellees' argument is based on the assumption that judicial construction lends definiteness to the word "obscene", whereas the Supreme Court of Kansas in this case, as well as in its earlier decision in *Mid-West Photo-Play Corp.* v. *Miller*, 102 Kan. 356, 169 Pac. 1154 (1918), specifically denied that it has the power to compel or correct any particular construction of the statute by the Board.

C. The Constitutionality of the Kansas Motion Picture Censorship Law Is Not *Res Judicata*

Appellees argue (pp. 9-10) that by reason of the decision in *Mutual Film Corp.* v. *Hodges,* 236 U. S. 248 (1915), the constitutionality of the Kansas Motion Picture Censorship Law is *res judicata.* Obviously the doctrine of *res judicata* has no application here. In the first place, the parties are not the same. In the second place, the issues are not the same because a different motion picture and different grounds of attack upon the Kansas Motion Picture Censorship Law are involved. In the third place, it is quite evident that the Kansas *Mutual Film* case, which relies upon *Mutual Film Corp.* v. *Industrial Commission of Ohio,* 236 U. S. 230 (1915), would no longer be followed by this Court. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954).

D. The Acts of the Kansas State Board of Review Are Not Subject to Adequate Judicial Review

Appellees argue (pp. 10-12) that the action of the Board is subject to adequate judicial review. The extent of judicial review actually afforded is exemplified by this case. It is readily evident from the opinion of the Supreme Court of Kansas that it construed the statutory standards in the abstract and denied that it had any power to determine whether the Board had correctly construed the standards. This is emphasized by its reliance on *Mid-West Photo-Play Corp.* v. *Miller, supra,* in which the court said (169 Pac. at p. 1155):

> "So here, the duty and discretion placed in the board of review being administrative in character and nonjudicial, the court is not warranted in substituting its judgment for that of the board. If the board should act fraudulently or so arbitrarily and

> capriciously as to amount to fraud, a resort to the courts may be had and as against such action an aggrieved party may have redress. • • •"

Clearly such limited judicial review does not satisfy constitutional requirements, particularly where the administrative action is censorship within the area protected by the First Amendment. See, *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495 (1952); *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 343, 121 N. E. 2d 585 (1954).

Conclusion

For the foregoing reasons the arguments advanced by appellees in their Motion to Dismiss or Affirm are wholly without merit. In addition, it should be noted that the motion makes no mention of one basic question raised by appellants, namely, whether the Kansas Motion Picture Censorship Law subjecting motion pictures to a licensing system which requires advance submission to administrative officials for their judgment as to content is invalid on its face as repugnant to the guarantee of freedom of expression contained in the First Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States. We submit that this question, as well as the other questions raised by this appeal, are plainly of such a character as to require full exploration on briefs and oral argument. The Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

James C. Wilson
George T. Morton, Jr.

Watson, Ess, Marshall & Enggas
Of Counsel

No. 338

FILED
NOV 14
HAROLD R. WILL

In the Supreme Court of the United States.

OCTOBER TERM, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants,*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, Constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

Petition of Harold R. Fatzer, Attorney General of the State of Kansas, For Rehearing

HAROLD R. FATZER,
Attorney General,
PAUL E. WILSON,
Assistant Attorney General,
Attorneys for Petitioner.

28-1649

In the Supreme Court
of the United States

OCTOBER TERM, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants,*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, Constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

PETITION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

Comes now Harold R. Fatzer, Attorney General of the State of Kansas, and one of the appellees herein, and presents this his petition for rehearing of the above entitled cause and in support thereof respectfully states to the Court:

I

On October 24, 1955, the Court entered the following order in the above entitled case:

> "*PER CURIAM:* Judgment reversed. *Joseph Burstyn, Inc., v. Wilson,* 343 U. S. 495; *Superior Films v. Dept. of Education,* 346 U. S. 587."

Said order was entered without oral argument, without briefs on the merits, and without notice to counsel that said cause was pending for final determination.

II

The judgment reversed as aforesaid was entered by the Supreme Court of the State of Kansas on April 9, 1955, in the case of *Holmby Productions, Inc., et al., v. Vaughn, et al.,* 177 Kan. 728, 282 P. 2d 412, wherein said Supreme Court of Kansas had upheld the constitutionality of sections 51-101 to 51-112 and 74-2201 to 74-2209 of the General Statutes of Kansas of 1949. The statutes there under attack were originally enacted by the Legislature of the State of Kansas in 1913 (Chapter 294, Laws of 1913), and have remained in full force and effect since that time, except as amended by subsequent legislatures. (Chapter 308, Laws of 1917; Chapter 75, Laws of 1921; Chapter 14, Laws of 1923; Chapter 196, Laws of 1925; Chapter 224, Laws of 1931; Chapters 213 and 278, Laws of 1933; Chapter 206, Laws of 1935; Chapter 277, Laws of 1941; and

Chapter 410, Laws of 1949.) The constitutional validity of the said statutes has been affirmed by the Supreme Court of the State of Kansas (*State, ex rel., v. Ross,* 101 Kan. 377, 166 P. 505, and *Photo-Play Corporation v. Board of Review,* 102 Kan. 356, 169 P. 1154), and by this Court (*Mutual Film Corporation of Missouri v. Hodges, et al.,* 236 U. S. 248, 59 L. Ed. 561).

III

The issues in said cause were so drawn by the parties as to present to this Court for determination the following questions:

1. Whether the Kansas Motion Picture Censorship Law subjecting motion pictures to a licensing system which requires advance submission to administrative officials for their judgment as to the content is invalid on its face as repugnant to the guarantee of freedom of expression contained in the First Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

2. Whether the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law as applied by the Kansas State Board of Review with respect to the motion picture entitled "The Moon is Blue" are by that application given a construction so broad, vague and indefinite as to render such standards, and each of them,

invalid as repugnant to the guarantee of freedom of expression contained in the First Amendment and to the due process clause contained in the Fourteenth Amendment to the Constitution of the United States.

3. Whether under the Kansas Motion Picture Censorship Law as construed by the Supreme Court of Kansas the available judicial review of the action by the Kansas State Board of Review in disapproving films is sufficient to comply with the due process and freedom of expression guarantees contained in the Constitution of the United States.

IV

This petitioner has carefully considered the Court's judgment of October 24, 1955, together with the opinions cited therein. In candor, petitioner is compelled to state that he finds therein no assistance in answering the questions presented by this appeal. The appellants herein have attacked the statutory standard "obscene." Neither of the cases cited appear to be concerned with that standard. *Burstyn v. Wilson,* supra, concludes with the following statement:

> "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one

> now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that is 'sacrilegious'."

In the *Superior Films* case the Ohio Agency had banned a film "on account of being harmful." A companion case presented an attack on the standards "immoral" and "would tend to corrupt morals." (*Commercial Pictures Corp. v. New York*, 346 U. S. 587, 98 L. Ed. 329.) The Court there entered a *per curiam* opinion which furnishes no guide in the instant case.

V

This petitioner, as Attorney General, is the chief law officer of the State of Kansas. He is charged with the responsibility of advising other state officials on questions of law and enforcement of the laws of the state. He has assumed and must assume the validity and effect of the Kansas Motion Picture Censorship Law until such time as that law is declared invalid by a court of competent jurisdiction. The present decision raises doubt as to the validity of the statute without pointing out wherein it is defective. Petitioner does not know and cannot ascertain whether this court has determined that (1) censorship is *per se* unconstitutional, or (2) the particular standard here applied is so indefinite and uncertain as to deny due process, or (3)

the judicial review afforded by the statute, as construed by the Supreme Court of Kansas, is insufficient. Petitioner respectfully submits that the questions here presented are of sufficient importance, not only to this petitioner and the officials responsible for the administration of the Kansas Motion Picture Censorship Law, but to the people of the State of Kansas as to require full examination on their merits and definitive answers by this Court.

VI

Petitioner states that the judgment here reversed is a decision of the highest court of the State of Kansas; that it construes a statute which has been in full force and effect for more than forty-two years and appears to be supported by decisions both of the highest court of the State of Kansas and of the Supreme Court of the United States. Petitioner respectfully submits that before any judgment is entered reversing that decision, this Court should cause the matter to be docketed for full hearing, and that the parties should be given the opportunity to present briefs and argument on the merits of the questions involved. Petitioner further submits that any judgment reversing the decision of the Supreme Court of Kansas as aforesaid should be accompanied by a statement demonstrating wherein the decision of said Supreme Court of Kansas is erroneous.

WHEREFORE, It is respectfully urged that this petition for rehearing be granted, and that the parties be afforded an opportunity to file briefs on the merits and present oral argument herein, and that the decision of the Court state whether censorship of motion pictures in *per se* is offensive to the constitution, whether the standards contained in Kansas statutes and applied in the instant case are so indefinite as to deny due process, and whether the procedure for judicial review as contained in the Kansas statute and interpreted by the Supreme Court of Kansas be violative of constitutional rights.

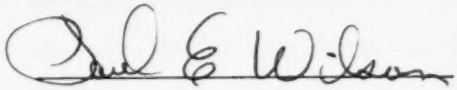
Respectfully submitted,

HAROLD R. FATZER,
Attorney General,
PAUL E. WILSON,
Assistant Attorney General,
Topeka, Kansas,
Attorneys for Petitioner.

By

CERTIFICATE OF COUNSEL

I, Counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.



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No. 338. HOLMBY PRODUCTIONS, INC. ET AL. *v.* VAUGHN ET AL., CONSTITUTING THE KANSAS STATE BOARD OF REVIEW, ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587. *James C. Wilson* for appellants. *Harold R. Fatzer*, Attorney General of Kansas, and *Paul E. Wilson*, Assistant Attorney General, for appellees. Reported below: 177 Kan. 728, 282 P. 2d 412.

No. 49 Misc. WEISS *v.* MISSISSIPPI. Appeal from